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No. 883

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATNI BANKA CESKOSLOVENSKA, PETITIONER

v.

EDWIN B. WOLCHOCK, AS RECEIVER OF ZIVNOSTENSKA BANKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated April 22, 1963, the Solicitor General was invited to express the views of the United States. For the reasons indicated below, we believe that this case does not warrant review by writ of certiorari.

1. This case is so closely interrelated with another case which is not before the Court, *Stephen* v. *Zivnostenska Banka*, that in order to discuss the issues

presented by the petition it is necessary to review the facts out of which both cases arise and to trace the development of both.

In 1945, the Czechoslovak government nationalized the Zivnostenska Banka, a private stock corporation which had assets on deposit in New York banks. In 1950, petitioner Statni Banka was created by Czechoslovak Law No. 31, and the Zivnostenska Banka was merged into the Statni Banka. Law No. 31 provided for the assumption by Statni Banka of the rights and obligations of Zivnostenska Banka, and some time thereafter title to certain of the New York assets was transferred from Zivnostenska Banka to Statni Banka.

In 1952, a creditor of Zivnostenska Banka brought an action (*Stephen* v. *Zivnostenska Banka*) in the Supreme Court of New York under Section 977-b of the New York Civil Practice Act. That section provides for the appointment of a receiver of assets located in the State and owned by a foreign corporation which has been nationalized (Section 977-b(1)) and vests title to those assets in the receiver (Section 977-b(19)); Section 977-b(16) provides for the payment of these assets to creditors and claimants of the nationalized foreign corporation. Pursuant to this provision, an order was issued appointing temporary receivers of the Zivnostenska Banka and its property located in New York, and another order was entered restraining various New York banks from transferring property deposited with them in the names of the Zivnostenska Banka and the Statni Banka.

The Statni Banka appeared as *amicus curiae* in this action and filed a claim of sovereign immunity as to its property affected by the restraining order. On

May 26, 1952, the Czechoslovak government represented to the Department of State that the Statni Banka, as a governmental organ, enjoyed sovereign immunity and asked that its property be released from the attachment. On June 4, 1952, the State Department asked the Department of Justice to present the position of the Czechoslovak government to the court "without argument or comment," as a matter of comity, and this was done. A number of issues, including Statni Banka's immunity, were referred to a referee; the immunity issue was determined against Statni Banka. The state Supreme Court confirmed this ruling, 140 N.Y.S. 2d 323, affirmed, 286 App. Div. 999, 145 N.Y.S. 2d 310, and eventually entered an order determining that the conditions precedent to the operation of Section 977-b were present and continuing in force the orders restraining transfer of the property deposited in the New York banks in the names of the Zivnostenska Banka and Statni Bank. 155 N.Y.S. 2d 340, affirmed, 2 App. Div. 2d 958, 157 N.Y.S. 2d 904, affirmed, 3 N.Y. 2d 862, 145 N.E. 2d 24, remitter added, 3 N.Y. 2d 931, 145 N.E. 2d 889, appeal dismissed for want of a substantial federal question, 356 U.S. 22 (1958).

On July 1, 1958, an order was entered by the state Supreme Court appointing a referee to hear and report on Zivnostenska Banka's property and directing the New York depositaries to submit to examination concerning the property held by them in the names of Zivnostenska Banka and Statni Banka. Then on March 24, 1959, the receiver for Zivnostenska Banka brought the present action (*Wolchok* v. *Statni Banka Ceskoslovenska*) in the Supreme Court to set aside transfers of property from Zivnostenska Banka to

Statni Banka on the ground that they had been made in fraud of Zivnostenska Banka's creditors; the receiver secured an ancillary order restraining the depositaries of property held in the name of Statni Banka from transferring it.

In January 1959 the Czechoslovak government requested the Department of State to effect the release of the property subject to the restraining orders then in effect. On June 26, 1959, at the request of the Department of State, the Department of Justice filed with the court in the *Zivnostenska Banka* case a Suggestion of Immunity to the effect that the State Department accepted as true the Czechoslovak government's representation that it owned certain assets restrained by the orders in that case; that, since Zivnostenska Banka had been engaged in commerical (not governmental) activities, such property was subject to attachment for purposes of retaining jurisdiction; but that, since the property was owned by the Czechoslovak government, it would be immune from execution. On the same day, also at the request of the State Department, the Justice Department filed in the present case (*i.e.*, the *Statni Banka* case) a Suggestion of Immunity to the effect that the State Department accepted as true the Czechoslovak government's representation that it owned certain assets covered by the restraining order in this case; that, since the Statni Banka is a government instrumentality of Czechoslovakia, it is immune from suit and its property is immune from attachment; and that such property should be released.

Thereupon, petitioner Statni Banka moved that the present action be dismissed and that the property that was the subject of the Suggestion of Immunity herein

be released. Zivnostenska Banka also moved that the restraining order in the *Zivnostenska Banka* case be vacated insofar as it affected property claimed by the government of Czechoslovakia. Subsequently, in December 1959 and May 1960, two additional letters from the Department of State were submitted in the *Zivnostenska Banka* case (which was before the same court as the present case); their purport was that the State Department, in the communication on which the Suggestion of Immunity therein was based, had not intended to resolve any genuine dispute as to the ownership of the property in question and that such issues were for judicial determination.

The state Supreme Court granted Statni Banka's motion to dismiss the instant case against it, on the ground that Statni Banka was immune from suit; the court also released the claimed property from the restraining order it had issued in this case. In the *Zivnostenska Banka* case, however, the court held that the question of ownership of the claimed property remained for judicial determination, and it declined to release the property that had been subject to its prior orders in the *Zivnostenska Banka* case. On appeal of the *Zivnostenska Banka* case, the Appellate Division affirmed, holding that the adjudication of rights to property in the custody of the court and within its jurisdiction is a judicial function and that the Suggestion of Immunity could not preclude judicial determination of title to the assets before the court; moreover, the court concluded, the State Department's subsequent letters seemed to recognize this principle. This decision was affirmed by the New York Court of Appeals; review was not sought in this Court.

On appeal of the Supreme Court's order of dismissal and release in the instant case, the Appellate Division affirmed the dismissal as to Statni Banka on account of its immunity from suit. However, it reversed the Supreme Court's order directing the release and discharge of property that had been subject to the prior restraining order issued in this case, on the apparent ground that the said property is also subject to the restraining orders in the *Zivnostenska Banka* case, in which questions as to the true ownership of the property remained to be determined. The New York Court of Appeals affirmed, with one judge dissenting.

2. Petitioner's primary reason for seeking the writ is its assertion that the decisions of the New York courts have frustrated the Department of State in what it was attempting to accomplish in its suggestions of immunity in this and the *Zivnostenska Banka* cases. On the contrary, the primary result sought to be achieved by the Suggestion of Immunity filed in this case—that the courts should not exercise jurisdiction over a foreign State or its instrumentality—has been fully realized by the final dismissal of this suit against Statni Banka (see pp. 5, 6, *supra*). No such result is required in the *Zivnostenska Banka* case, since neither Czechoslovakia nor the Department of State has ever suggested that Zivnostenska Banka was an instrumentality of the Czechoslovak government.

Moreover, there is no clear conflict between decisions of the state courts and the State Department's position with respect to genuine disputes over the ownership of property claimed by a foreign State. The Department did not, nor does it now, pass judg-

ment upon the true ownership of the property that is the subject of these suits. It is the Department's position, reflected in the letters filed in the *Zivnostenska Banka* case (see p. 5, *supra*), that such a question is appropriate for judicial determination. Cf. Restatement, Foreign Relations Law of the United States, Section 75(2) (A.L.I. Proposed Official Draft 1962); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30.

Nor is there any merit to petitioner's contention (see Pet. 8) that the decisions below interfere with negotiations between this country and the Czechoslovak government concerning the settlement of claims arising out of Czechoslovakian nationalization of the property of American citizens. An understanding with the Czechoslovak government concerning such property has already been reached. Under that understanding, the amount of money the United States will receive in settlement of outstanding claims against the Czechoslovak government will be reduced to the extent of any property claimed in these cases by the Czechoslovak government but not ultimately released to it.[1] Thus, neither the settlement negotiations nor the relations between the two countries will be affected by the outcome of these cases.

3. Petitioner in its reply brief attacks the premise of the Appellate Division that the property subject to the restraining order in this case is also subject to the restraining orders in the *Zivnostenska Banka* case; petitioner argues that the order in this case is much broader and covers much more property than the orders in the other case. If that be so, the appropriate

[1] In the event none of the property claimed by Czechoslovakia in these cases is released to it, the amount of money to be received by the United States will be reduced by one million dollars.

source of relief would be the New York state courts. The allegedly undue breadth of the restraining order would not seem to raise a federal question.

In view of the considerations set forth above, we do not believe that grant of the petition for a writ of certiorari is warranted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

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